Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1836

GREGORY K. LEWIN
PETITIONER,

VS.

STATE OF NEW JERSEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

GREGORY K. LEWIN, Petitioner

v.

STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Petitioner prays that a writ of certiorari issue to review the judgement of the Superior Court of New Jersey, Appellate Division which was made and entered in the above cause, on November 15, 1978.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division is reported at 163 N.J. Super 441 (App. Div. 1978), 395 A. 2d 212. Said opinion appears in the Appendix hereto.

After a timely petition, certification by the Supreme Court of New Jersey was denied on April 10, 1979 without

opinion. Said denial of certification is reported at ___N.J.___(1979),___A.2d ___, and appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Whether the Supreme Court intended that the rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution must be implemented with the Miranda rules in motor vehicle offenses where there is a potentiality of incarceration.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as certain New Jersey state statutory provisions.

A. THE FIFTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Fifth Amendment provides:

No person...shall be compelled in any criminal case to be a witness against himself.

B. THE SIXTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right...to the Assistance of Counsel for his defense.

C. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Fourteenth Amendment provides:

....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. THE RELEVANT NEW JERSEY STATUTES

N.J.S.A. 2A: 113-9

Death by heedless and careless operation of an automobile

Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a misdemeanor.....

N.J.S.A. 2A: 85-7

Misdemeanors; punishment

Any person found guilty of a crime which by any statute is declared to be a misdemeanor, and for which no

punishment is specifically provided, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 3 years, or both.

N.J.S.A. 39: 4-50

Operating under influence of liquor; penalty

A person who operates a motor vehicle while under the influence of intoxicating liquor...shall be subject, for the first offense, to a fine...or imprisonment for a term of not less than 30 days no more than 3 months or both, in the discretion of the magistrate...(F)or a subsequent violation, he shall be imprisoned for a term of 3 months.

N.J.S.A. 2A: 158A-5.2

Offenses and violations; legal representation

The Public Defender shall...provide for the legal representation of any person charged with a disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature where there is a liklihood that the persons so charged, if convicted will be subject to imprisonment or, in the opinion of the court, any other consequence of magnitude.

(Irrelevant portions of the foregoing New Jersey statutes have been omitted.)

STATEMENT OF THE CASE

Petitioner was charged by way of indictment with death by heedless and careless operation of an automobile pursuant to N.J.S.A. 2A: 113-9. On January 11, 1978 a jury returned a guilty verdict and shortly thereafter the petitioner was sentenced to a one (1) year term in the county jail of which five (5) months were suspended.

The indictment resulted from an accident whereby the petitioner's automobile struck two pedestrians. One of the victims died a few hours later at the hospital. At the scene, shortly after the accident and prior to the death, the petitioner was arrested for operating a motor vehicle while under the influence of liquor in violation of N.J.S.A. 39: 4-50. He was transported to police headquarters where he was questioned at length about the accident and his drinking that night. This round of questioning was not preceeded by Miranda warnings. During this interrogation the victim had not yet died.

The petitioner was questioned a second time at headquarters that same night. The police tape recorded these questions

and answers and gave the Miranda warnings prior to taping. The victim was still alive at the beginning of this second interrogation.

At the trial of the death by auto indictment, a motion to suppress the statements was denied. The answers the petitioner gave in response to the first interrogation (without the benefit of Miranda warnings) differed materially with the answers the petitioner gave on tape. Both statements were introduced on the state's case.

The trial court ruled that Miranda warnings were not required despite the "in-custody" interrogation of the petitioner and despite the potentiality of his incarceration of the charges for which he was originally arrested as well as the charges for which he was ultimately indicted and tried.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS ON AN ISSUE WHICH CONTINUES TO CAUSE CONTROVERSY AND LITIGATION.

The specific issue raised in this petition is whether the warnings prescribed in Miranda v. Arizona, 384 U.S. 436 (1964) are mandated in connection with a motor vehicle violation, the conviction of which carries a potentiality of incarceration.

The facts of the case at bar bring to light the Constitutional difficulties created by the New Jersey Supreme Court's ruling in State v. Macuk, 57 N.J. 1, 268 A 2d 1 (1970), wherein that court held; "(We) are of the opinion...the rules of Miranda should be held inapplicable to all motor vehicle violations." 57 N.J. at 15-16, 268 A. 2d at 9. This mandate was followed by the Superior Court of New Jersey, Appellate Division in the instant case when it held that statements elicited from the petitioner, while in custody at police headquarters, were admissible

on the state's case. State v. Lewin, 163 N.J. Super 441 (Appellate Division 1978), 395 A. 2d 212. The petitioner initially had been arrested for driving a vehicle under the influence of liquor pursuant to N.J.S.A. 39: 4-50.

The introduction of the petitioner's "in-custody" statement occurred during his trial on an indictment charging him with causing death by heedless and careless operation of an automobile pursuant to N.J.S.A. 2A: 113-9. The Court in the instant case held:

> "Here, of course, the statements were offered and admitted into evidence in the prosecution of a criminal offense arising out of the accident. This circumstance, however, affects neither the validity nor the admissibility into evidence of the statements. If, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible, without Miranda warnings, in a prosecution of the charge as to which they were taken, they retain their valid character and equally admissible in a subsequent prosecution of a criminal offense." Id., 163 N.J. Super at 441, 395 A. 2d at 213.

The question presented in this petition has been litigated in many state jurisdictions as well as in the federal courts and there is a split of authority in those jurisdictions.

Several state and federal courts have held that not withstanding "in-custody" interrogation, Miranda warnings are not required with respect to motor vehicle violations: State cases - State v. Neal, Mo., 476 S.W. 2d 547 (1972); County of Dade v. Callahon, 259 So. 2d 504 (Fla. 1971); State v. Macuk, supra; State v. Pyle, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), cert. den. 396 U.S. 1007 (1970); State v. Bliss, Del. 238 A. 2d 848 (1968); Federal cases - Clay v. Riddle, 541 F. 2d 456 (4 cir. 1976).

Other state and federal decisions have held that Miranda warnings are necessary prior to any "in-custody" questioning of persons arrested for motor vehicle offenses:

State cases - State v. Lawson, 285 N.C. 320, 204 S.E. 2d 843 (1974); State v. Darnell, 8 Wash. App. 627, 508 P. 2d 613, cert. den., 414 U.S. 1112 (1973);

Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, (1971); Commonwealth v. Bonser, 215 Pa. Super 452, 258 A. 2d 675 (Super. Court 1969) People v. Phinney,22 N.Y. 2d 288, 292 N.Y.S. 2d 632, 239 N.E. 2d 515 (1968);

Federal Cases - U.S. v. Le Quire, 424 F. 2d 341, 343-344 (5th Cir. 1970); U.S. v. Chadwick, 415 F. 2d 167, 173 (10th Cir. 1969); Lowe v. U.S., 407 F. 2d 1391, 1394 (9th Cir. 1969); Allen v. U.S., 129 U.S. App. D.C. 61, 390 F. 2d 476, 478-79 (1968).

In some of the opinions holding Miranda not applicable to motor vehicle violations, the courts have commented on the absence of guidelines. In Bliss, supra, the Court noted:

> "Up to the present, the Supreme Court of the United States has not laid down a specific division line between those cases in which Miranda applies and those in which it does not...Until the Supreme Court furnishes further guidelines, we will not apply it to motor vehicle violations." 238 A. 2d at 850.

In Macuk, supra, the court said:

> "Now, with the problem squarely before us, we are of the opinion that, in view of the absence of any indications to the contrary by the United States Supreme Court, the rules of Miranda should be held inapplicable to all motor vehicle violations." 57 N.J. at 15-16, 268 A. 2d at 9.

It should be noted that none of the authorities cited that stand for or against the proposition that Miranda applies to motor vehicle violations ruled on the question under the law or constitutional authority of that state. All of the opinions refer to the Fifth or Sixth Amendments to the Federal Constitution or to the Miranda rights involved. Thus the disparity between rulings can not be explained away as legitimate interpretations by state courts of their respective state laws.

Since this issue arises from time to time in both the state and federal jurisdictions, it would be helpful if this Court would put the issue to rest by accepting review of this case.

II.

THE COURT BELOW ERRED IN ITS RULING THAT THE MIRANDA WARNINGS DID NOT APPLY TO AN "IN-CUSTODY" INTERROGATION OF A DEFENDANT CHARGED WITH A MOTOR VEHICLE OFFENSE WHICH CARRIED WITH IT THE POTENTIALITY OF INCARCERATION.

The Supreme Court of the United States has refused to apply some provisions of the Bill of Rights to the state courts, such as the right to a jury trial, in so-called petty offenses, which it has defined "as those punishable by no more than six months in prison and a $500 fine." Duncan v. Louisiana 391 U.S. 145, 161 (1968). On the other hand, the Court's opinion in Argersinger v. Hamlin, 407 U.S. 25 at 37 (1972), held that the Constitutional right to counsel attached to any offense, whether classified as petty, misdemeanor or felony, for which one may be imprisoned.

The opinion in Argersinger, supra, historically distinguished the right to a trial by jury from the right of assistance of counsel. The Court drew upon its decision in Powell v. Alabama, 287 U.S. 45 at 60 whereby it held:

> "While there is historical support for limiting the 'deep committment' to trial by jury to 'serious criminal cases' there is no such support for the similar limitation on the right of assistance counsel." Argersinger, supra at 30.

In the case at bar, the petitioner requests the court to consider whether the warnings required by Miranda should be limited to "serious criminal cases" or whether there is no such support for a limitation on those warnings.

The Supreme Court of New Jersey, in a decision that predated Argersinger, supra, recognized the right of all persons to representation by counsel where there existed the potentiality of consequenses of magnitude or imprisonment:

> "...But as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Rodriguez v. Rosenblatt, et al. 58 N.J. 281 at 295 (1971).

The New Jersey Legislature codified the decision in Rosenblatt, supra, requiring the assignment of counsel to indigent defendants "where there is a liklihood that the persons so charged, if convicted will be subject to imprisonment or, in the opinion of the court, any

other consequence of magnitude" N.J.S.A. 2A: 158A-5.2. This statute was in effect at the time of the petitioners arrest.

The petitioner contends that the warnings set out in Miranda are required in any offense, whether classified as petty, misdemeanor or felony, for which one may be imprisoned. Miranda contains rules of procedure which were created to protect an accused against infringement of the constitutional privilege agaist self incrimination. The Court, in formulating the Miranda warnings partially based their decision on the Sixth Amendment right to counsel:

> "...(T)he right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system we delineate today." Miranda, supra, at 466.

Under New Jersey case law (Rodriguez, supra), and federal constitutional law (Argersinger, supra), there exists the right to counsel in any offense that carries the potentiality for incarceration. It is inconsistant with the policies underlying those decisions to require on one hand, that the right to assistance of counsel be protected with respect to a defendant charged with an imprisonable

offense while on the other hand with respect to that same imprisonable offense, to permit the police not to advise the accused of his Miranda rights, which include the right to have the assistance of counsel.

The potentiality of incarceration rather than whether a state labels an offense a felony, misdemeanor or motor vehicle violation should be the test of whether Miranda applies. In the instant case, the petitioner was arrested for driving under the influence of intoxicating liquor, the conviction of which carried a maximum penalty of 3 months under N.J.S.A. 39: 4-50. For a second offense under this statute the 3 month sentence was mandatory. Despite the potentiality of incarceration, New Jersey labels such an offense a motor vehicle violation or a "petty offense". Macuk, supra, at 9. Simply because New Jersey happened to label the petitioner's offense a petty one did not mean his conviction would not entail a deprivation of liberty.

The requirement of warnings based upon the manner in which a state labels a certain offense would be too mechanical

to serve the substantial interest of protection of fundamental liberties articulated in Miranda and would result in inconsistency among the states due to the varying definitions of these terms. Requiring Miranda warnings for any offense for which the loss of liberty is a possible sanction would resolve the long standing problem of the applicability of Mirnada to nonfelonies.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issues to review the judgment rendered by the Superior Court of New Jersey, Appellate Division in this case.

Respectfully submitted,

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Appendix A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2407-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY K. LEWIN,

Defendant-Appellant.

Submitted October 30, 1978--
Decided November 15, 1978 Before
Judges Allcorn and Botter.
On appeal from Superior Court of
New Jersey, Law Division, Ocean
County.
Julio M. Fuentes, attorney for the
appellant.
John J. Degnan, Attorney General,
attorney for the respondent
(Susan W. Sciacca, Deputy Attorney
General, of counsel and on the
brief).
The opinion of the court was de-
livered by

ALLCORN, P.J.A.D.

The defendant appeals his conviction of the offense of causing death by careless and needless operation of an automobile in violation of N.J.S.A. 2A:

113-9, entered upon a jury verdict.

Defendant was arrested for driving a vehicle while under the influence of intoxicating liquor, following an accident in which defendant's vehicle struck two pedestrians. During the police investigation at the scene and at police headquarters and before defendant was given any Miranda warnings, defendant made certain statements to the police concerning the circumstances surrounding the occurrence of the accident, including his consumption of alcohol prior to the accident. Subsequent to the making of said statements, one of the pedestrians died as a result of the injuries he suffered and, thereafter, defendant was charged with the present criminal offense. At the criminal trial, defendant's statements were admitted into evidence by the trial judge. The defendant contends that the statements were not admissible because they were not preceded by a notice or warning of his rights.

In essence, the defendant urges that the statements should not have been admitted against him, since to do so was in violation of his rights as laid down in Miranda v. Arizona, 384 U.S. 436 (1966).

The law in New Jersey is plain that Miranda warnings need not be given to a person arrested for or charged with a violation of the motor vehicle laws such as drunken driving, before investigatory questioning of him. State v. Macuk, 57 N.J. 1 (1970). In short, "the rules of Miranda should be held inapplicable to all motor vehicle violations," Macuk, supra, page 16, and statements obtained from the defendant are admissible against him in prosecutions for such motor vehicle violations.

Here, of course, the statements were offered and admitted into evidence in the prosecution of a criminal offense arising out of the accident. This circumstance, however, affects neither the validity nor the admissibility into evidence of the statements. If, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible, without Miranda warnings, in a prosecution of the charge as to which they were taken, they retain their valid character and are equally admissible in a subsequent prosecution of a criminal offense. As well stated in Clay v. Riddle, 541 F. 2d 456

(4 Cir. 1976), in addressing a very similar situation (at page 459):

> * * * (S)ince the challenged statement arose in the environs of the unlawful highway operation of an automobile, its stature is rated on that measure. Those circumstances mold its character permanently. Where lifted out of the milieu of its origin, obviously the initial character as a declaration in a traffic case is retained.

Accord, People v. Tate, 45 Ill 2d 540,259 N.E. 2d 791 (1970), cert. den. 401 U.S. 941 (1971).

Defendant also contends that his sentence was excessive. The contention is clearly without merit. R. 2:11-3(e) (2).

Affirmed.

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-573 SEPTEMBER TERM 1978

STATE OF NEW JERSEY, Plaintiff-Respondent, v. GREGORY K. LEWIN, Defendant-Petitioner,	:	ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same ,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 10th day of April, 1979.

Supreme Court, U. S.
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JUL 30 1979
MICHAEL RODAK, JR., CLERK

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No. 78-1836

GREGORY K. LEWIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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No. 78-1836

GREGORY K. LEWIN,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of New Jersey, respectfully prays that the Writ of Certiorari sought by Petitioner to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on November 15, 1978, be denied.

Opinions Below

The following proceedings of the state courts are reproduced in the Petitioner's appendix: the order of the Supreme Court of New Jersey denying certification, not yet reported; and the opinion of the Superior Court of New Jersey, Appellate Division, reported at 163 N.J.Super. 439, 395 A.2d 211 (App. Div. 1978).

Statutes Involved

In addition to the statutes cited in the Petition for Certiorari, Respondent wishes to incorporate the following:

N.J.S.A. 39:3-12. Illegal securing of driver's license; punishment

No applicant for a driver's license shall employ or procure the employment of another person to take the license examination for him, and no person shall take a driver's license examination in the name of or in the place of the applicant. No person shall procure or attempt to procure a driver's license without taking the examination therefor as herein provided, nor shall a person procure or attempt to procure a driver's license for another who has not taken an examination therefor.

A person who violates any provision of this section shall be subject to a fine of not less than two hundred dollars nor more than five hundred dollars, or imprisonment for not less than thirty days nor more than ninety days, or both, at the discretion of the court.

N.J.S.A. 39:4-96. Reckless driving; punishment

A person who drives a vehicle on a highway heedlessly, in willful or wanton disregard of the rights

or safety of others, in a manner so as to endanger, or be likely to endanger, a person or property, shall be guilty of reckless driving and be punished by imprisonment in the county or municipal jail for a period of not more than 60 days, or by a fine of not more than $200.00, or both. On a second or subsequent conviction he shall be punished by imprisonment for not more than 3 months, or by a fine of not more than $500.00, or both.

N.J.S.A. 39:4-104. Violations of article; penalty

A person violating a section of this article [Article 12-Speed] shall, for each violation, be subject to a fine of not more than $200.00, or imprisonment for a period not exceeding 10 days, or both, except as herein otherwise provided.

N.J.S.A. 39:4-129. Action in case of accident.

(b) The driver of any vehicle knowingly involved in an accident resulting only in damage to a vehicle, including his own vehicle, or other property which is attended by any person shall immediately stop his vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of subsection (c) of this section. Every such stop shall be made without obstructing traffic more than is necessary. Any person who shall violate this subsection shall be fined not less than $25.00 nor more than $100.00, or be imprisoned for a period of not more than 30 days, or both, for the first offense, and for a subsequent offense, shall be fined not less than $100.00 nor more than $200.00, or be imprisoned for a period of not less than 30 days nor more than 90 days, or both.

Counter-Statement of Questions Presented

1. Whether the failure of Petitioner to fully raise his constitutional issues in state court mandates denial of the petition for writ of certiorari.

2. Whether the lack of a sufficient case or controversy mandates dismissal of the petition for writ of certiorari when even a favorable decision on the merits of his argument would not change the outcome of Petitioner's case.

3. Whether the requirements of *Miranda* v. *Arizona* should be extended to routine interrogation for motor vehicle violations which expose offenders to potential incarceration.

Counter-Statement of the Case

Pursuant to U.S. Sup. Ct. Rule 40-3, 28 U.S.C.A., Respondent respectfully submits the following additions and corrections to Petitioner's Statement of the Case.

Petitioner Gregory K. Lewin was convicted of causing the death of Thomas Brady, a pedestrian, by careless and heedless operation of his automobile, contrary to N.J.S.A. 2A:113-9. Petitioner had been driving his automobile in an intoxicated condition when he struck Thomas Brady and Deborah Majoros, a young couple who were crossing the street after leaving a roadhouse in the Borough of Point Pleasant, New Jersey.

Officer Thomas M. Santoro of the Borough of Point Pleasant Police was patrolling in his police vehicle near the roadhouse when he saw several people running across the street and noticed Deborah lying on the sidewalk about one foot from the curb. The officer immediately summoned an ambulance. He noted that Deborah was bleeding from the head and had arm and leg injuries. She was extremely

upset and could only say that she had been struck by a car. The officer next went to Thomas Brady, whom he found over fifty feet from the intersection, lying in some small bushes. Brady's breathing was very deep, and sounded like moaning. He was bleeding from the mouth and ears and both of his legs appeared broken. Officer Santoro rendered first aid and tried to make both victims comfortable until the ambulance arrived.

As Officer Santoro was helping Brady, he inquired of the crowd gathering around if there were any witnesses to what had occurred. Petitioner Gregory Lewin responded, "I hit them." The officer continued rendering first aid to Brady, but he told Lewin to stand by until the ambulance arrived. Petitioner obeyed.

After the victims were taken to the hospital, Officer Santoro turned his attention to the Petitioner. When he spoke to him, the officer observed that his eyes were bloodshot and watery, his speech was low and slightly slurred, and he wavered and swayed on his feet, continually leaning for balance. There was a strong smell of alcohol on his breath. In the officer's expert opinion, Petitioner was intoxicated. After making these observations and reaching this conclusion, Officer Santoro arrested Petitioner for driving while intoxicated, and placed him in a police vehicle to take him to headquarters.

The officer spoke to Petitioner at headquarters and ascertained that Lewin had been drinking beer and whiskey at the roadhouse. In response to Officer Santoro's inquiry concerning how the accident had happened, Lewin stated that he left the roadhouse, drove a short distance, realized he had hit something, drove two more blocks, and then turned around and returned to the place of impact.

After the Petitioner's brief interview with Officer Santoro, the police administered a breathalyzer test to him.

Following this test, Detective Joseph Lynch took a statement from Petitioner which was taped and then transcribed. Before asking any questions, the detective read Petitioner his *Miranda* warnings and ascertained that he would waive his rights. As Petitioner was describing the amount of alcohol he had consumed, his statement was interrupted to inform Petitioner that the police had just learned that Brady had died. The statements then resumed, with Petitioner admitting that he had struck the pedestrians, but claiming that they had walked in front of his car.

At the scene, Officer Santoro found three empty beer containers in the Petitioner's car. The automobile had sustained damage to the right headlight and fender. Two handprints were found on the center of the hood of the vehicle.

Petitioner was charged with the indictable offense of causing death by careless operation of his automobile. At trial defense counsel moved to suppress the statements given to Officer Santoro at headquarters. Particular emphasis was placed by counsel on a statement given by Petitioner concerning the exact driveway from which he had exited the roadhouse. No motion was made to exclude either the oral statements given by Petitioner to the patrolman at the scene of the accident or the recorded statement given to the detective at headquarters.

On appeal, Petitioner argued that the statements to the patrolman were beyond the scope of *State* v. *Macuk,* 57 N.J. 1, 268 A.2d 1 (1970), a decision of the New Jersey Supreme Court which held that the rules of *Miranda* were inapplicable to motor vehicle offenses. The Appellate Division rejected this contention, noting that "[i]f, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible,

without *Miranda* warnings, in a prosecution of the charges as to which they were taken, they retain their valid character and are equally admissible in a subsequent prosecution of a criminal offense." 395 A.2d at 212. Thereafter, the New Jersey Supreme Court denied certification.

The present Petition for Writ of Certiorari was docketed with this Court on June 8, 1979.

REASONS FOR DENYING CERTIORARI

POINT I

Certiorari should be denied because of petitioner's failure to fully raise his constitutional issues in the state courts.

The State contends that Petitioner failed to fully preserve his constitutional contentions in the state courts of New Jersey. Although he now seeks a writ of certiorari to challenge the New Jersey rule which permits interrogation of motor vehicle offenders without *Miranda* warnings, nowhere was this issue raised at trial or in his brief in the Appellate Division of Superior Court.* Similarly, in his petition for certification to the New Jersey Supreme Court, Petitioner failed to cast his issues in the Sixth Amendment form in which he now seeks review. For

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* In his Appellate Division brief Petitioner argued that the police questioning of him went beyond the limit authorized by the New Jersey Supreme Court in *State* v. *Macuk,* 57 N. J. 1, 268 A.2d 1 (1970), which held *Miranda* v. *Arizona,* 384 U.S. 436 (1966) inapplicable to motor vehicle offenses. He did not argue, as he now does in the petition for certiorari, that *State* v. *Macuk* sets forth an unconstitutional standard.

these reasons, Respondent asserts that certiorari must be denied.

New Jersey has a clear rule that issues "in no wise alluded to, much less squarely presented, in the courts below . . . need be given no consideration" in our higher appellate tribunals. *State* v. *Souss,* 65 N.J. 453, 460, 323 A.2d 484, 488 (1974). In light of the failure of Petitioner to fully and fairly raise his claims in state court and in light of the denial of his petition for certification, the State submits that there is an adequate state law procedural ground presently barring direct review of Petitioner's federal contentions. *Michigan* v. *Tyler,* —— U.S. ——, 98 S.Ct. 1942, 1951 n.7 (1978); *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965). When a contention has not been raised in state courts, "the issue is not one properly presented for review" before the United States Supreme Court. *Moore* v. *Illinois,* 408 U.S. 786, 799 (1972). Accord, *Dorszynski* v. *United States,* 418 U.S. 424, 431 n.7 (1974); *Brown* v. *United States,* 411 U.S. 223, 230 n.4 (1973).

Accordingly, the State submits that the writ of certiorari should be denied.

POINT II

The issue presented by petitioner does not implicate a case or controversy within Article III, Section 2.

Throughout his petition for certiorari Petitioner emphasizes the lack of *Miranda* warnings preceding his statements to the police. In truth, Petitioner gave two statements, the first consisting of brief responses to routine questions posed by the investigating officer, and the second consisting of a lengthy confession to a detective who preceded his interrogation with *Miranda* warnings. Never has Petitioner claimed that his initial statements to the investigating officer induced him to confess to the detective. At trial and on appeal Petitioner has not disputed the admissibility of the confession, which embraced each and every topic previously covered by the patrolman. Accordingly, even assuming for the sake of argument that *Miranda* warnings are constitutionally required following arrests for motor vehicle offenses, such a requirement would have had no effect on the outcome of the present case.

At the heart of Petitioner's state court objections to the admissibility of his *Miranda*-less statements was his fear that his credibility would be damaged by one inconsistent statement which he gave to the patrolman. This discrepancy concerned the location of the exit through which Petitioner left the roadhouse parking lot prior to driving down the street on which he struck the pedestrians. It was the existence of this discrepancy which prompted defense counsel to move to exclude the statements given to the patrolman.

The record of the trial reveals, however, that the location of the parking lot exit had utterly no bearing on the issues before the jury. The jury in the present matter had to determine whether Petitioner's operation of his automobile had been careless and heedless, in willful or wanton disregard for the rights or safety of others. N.J.S.A. 2A:113-9; *State* v. *Donley,* 85 N. J. Super. 127, 204 A.2d 149 (App. Div. 1964). The focus of the trial was on the degree of Petitioner's intoxication as it affected his ability to drive in a safe manner, *i.e.,* to see the pedestrians, to gauge his location in the lane, to bring the car to a halt and to swerve to avoid the accident. The path by which the automobile left the parking lot was not in serious dispute. This is particularly true

since Petitioner was able to convincingly explain the parking lot discrepancy as a good faith mistake by a person shaken by the accident and unfamiliar with the street names in the area.

As can be seen, the *Miranda* issue had scant substantive bearing on the present trial. Even if this Court were to rule that it was error for the patrolman to fail to administer warnings to the Petitioner, the confession to the detective would still remain to support the conviction.* The Court's opinion would thus be purely advisory.

It is well settled tht "[t]he judicial power does not extend to the determination of abstract questions." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324 (1936). A justiciable controversy must be founded in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining. *Id.* In light of the fundamental lack of controversy evinced by the present appeal, the State submits that a grant of certiorari would be a futile exercise. This is true even if, as Petitioner alleges, there is a split of authority across the country on the applicability of *Miranda* to motor vehicle offenses. The present case is an inappropriate one in which to resolve this conflict, involving as it does two cumulative statements and no issue of taint.

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* This result might be different had Petitioner argued that his initial admissions provided inducement for the confession—the so called "cat out of the bag" theory. See, *e.g., Tanner* v. *Vincent,* 541 F.2d 932, 934-937 (2 Cir. 1976). The failure of Petitioner to raise this contention at any level, however, precludes this Court from taking cognizance of it. See Point I, *supra.*

POINT III

The requirements of the *Miranda* decision should not be applied to interrogations for motor vehicle offenses.

Petitioner contends that the rules of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), should be applied to custodial interrogation for motor vehicle offenses in which the motorist faces the possibility of incarceration. Respondent strongly disagrees, contending that such a requirement is both unnecessary and highly burdensome on law enforcement.

First, the type of questioning and investigative procedures utilized for petty offenses differs markedly from that employed for serious crimes. In minor cases there is usually no necessity for concentrated investigation, and the interrogation generally occurs at or near the scene of the infraction. *State* v. *Pyle,* 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert.* den. 396 U.S. 1007 (1970). The questioning itself generally "encompasses only simple standard inquiries for the purpose of a necessary accident or violation police report . . ." *State* v. *Macuk,* 57 N.J. 1, 268 A.2d 1, 9 (1970). As a result, the fundamental reason for the *Miranda* rules—the need to overcome the inherent pressures of the interrogation atmosphere—are not present in the investigation of motor vehicle offenses. *State* v. *Neal,* 476 S.W. 2d 547 (Mo. 1972) (en banc).

Second, the requirement of *Miranda* warnings for minor offenses would severely burden law enforcement and the expeditious administration of justice without realizing the benefits to the individual which accrue when warnings are administered to a suspect undergoing interrogation for a serous crime. *State* v. *Macuk, supra,* 268 A.2d at 9. The *Miranda* decision was never meant to hamper the traditional investigatory functions of law enforcement. 384 U.S.

at 481; *Lowe* v. *United States,* 407 F.2d 1391 (9 Cir. 1969). A further extension of *Miranda* would place an undue burden on both the police and the municipal courts, which would be compelled to schedule additional hearings in otherwise routine traffic cases. "The great number of these lesser offenses, and the limited number of law enforcement officers, militate of necessity against surrounding the officers' routine investigation of these lesser offenses with elaborate, strict, highly formalized procedural safeguards." *State* v. *Angelo,* 251 La. 250, 203 So.2d 710, 711 (1967).

Third, and closely related to the previous argument, "it would be utterly impossible to provide sufficient lawyers to consult with the number of motor vehicle violators who would be likely to request legal advice." *State* v. *Macuk, supra,* 268 A.2d at 9. Although Petitioner seeks to extend *Miranda* to all offenses having a potential of incarceration, he fails to note the sheer volume of violators which this rule would encompass. For example, leaving the scene of an accident in which property damage (but no bodily injury) was caused can result in a 30-day term for a first offender and a 90-day term for a subsequent offender. N.J.S.A. 39:4-129(b). The potential punishment for reckless driving is 60 days in jail for a first offender and three months for a subsequent offender. N.J.S.A. 39:4-96. Speeding is punishable by imprisonment for a period not exceeding 10 days. N.J.S.A. 39:4-104. Illegal securing of a driver's license is punishable by incarceration for not less than 30 days nor more than 90 days. N.J.S.A. 39:3-12. Although these are but a few examples, the number of motor vehicle offenses carrying a potential of imprisonment are voluminous.

According to the *Annual Report of the Administrative Director of the Courts* (1976-1977), 1,013,386 non-parking traffic complaints and 2,483,353 parking complaints were

filed in the New Jersey municipal courts between September 1, 1976 and August 31, 1977. In that same year, 2212 persons received jail terms for the non-parking offenses and 168 served time for parking violations. From these figures, it is seen that the probability of receiving a custodial term for a motor vehicle offense is extremely low. On the other hand, the mere possibility of receiving such a sentence, based on statutory authority, is rather high. Thus, to impose the requirements of *Miranda* on all offenses which harbor a potential for incarceration would stagger law enforcement without securing substantial benefits to a significant percentage of violators.

Respondent urges this Court to consider the practical effects of the wholesale extension of *Miranda* urged by Petitioner. Motorists who request lawyers prior to routine interrogation will have to be transported to police stations to await counsel. Their vehicles will have to be secured in reasonable locations with an eye toward the safety of the automobile and its contents. Such measures would strain the resources of virtually all police departments. In addition, in many cases counsel will have to be provided by the State, which will have to absorb the cost. As this Court has observed in an analogous situation involving warrantless searches of automobiles stopped on the highways, "if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. * * * Such a constitutional requirement therefore would have imposed severe, even impossible burdens on many police departments." *Arkansas* v. *Sanders,* —— U.S. ——, 61 L.Ed.2d 235, 47 U.S.L.W. 4783, 4787 n.14 (1979). The result of extending *Miranda* will be even more drastic.

Based on all of these policy considerations, Respondent submits that the *Miranda* requirements should not be extended to interrogation of motor vehicle offenders.

CONCLUSION

For the reasons which are set forth herein, it is respectfully urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1836

GREGORY K. LEWIN
PETITIONER,

VS.

STATE OF NEW JERSEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

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IN THE
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STATE OF NEW JERSEY, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITIONER'S REPLY MEMORANDUM

Two of the three questions presented in Respondent's brief in opposition to the petition are arguments first raised by Respondent, thus, it is to Point I and Point II of the brief in opposition that this reply is directed.

In Point I, the argument is made that "Certiorari should be denied because of petitioner's failure to fully raise his constitutional issues in the state courts." A reading of the two page opinion in State v. Lewin 163 N.J. Super 441 (App. Div. 1978), 395 A.2d 212 (which is the subject of the

petition and is contained Appendix A thereof) reveals that the issue in the case was the New Jersey rule with respect to in-custody interrogations of motor vehicle arrestees:

> "During the police investigation at the scene and at police headquarters and before defendant was given any Miranda warnings defendant made certain statements to the police...At the criminal trial defendant's statements were admitted into evidence by the trial judge. The defendant contends that the statements were not admissible because they were not preceded by a notice or warning of his rights.
>
> In essence, the defendant urges the statements should not have been admitted against him, since to do so was in violation of his rights as laid down in Miranda..."Id., 163 N.J. Super at 441, 395 A.2d at 212.

The Appellate Division rejected Petitioner's urgings by reiterating the New Jersey rule that Miranda is inapplicable to all motor vehicle violations.

A constitutional issue was raised by the Petitioner before the New Jersey court and this Court. Respondent's argument to the contrary has no merit.

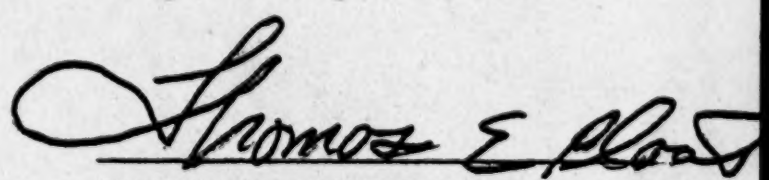
In Point II of the Respondent's brief, it is claimed that "The issue presented by

petitioner does not implicate a case or controversey within Article III, Section 2." This assertion is followed by an argument which is more akin to a claim of harmless error: "(E)ven assuming for the sake of argument that Miranda warnings are constitutionally required following arrests for motor vehicle offenses such a requirement would have no effect on the outcome of the present case." because the case involves "...two cumulative statements and no issue of taint." In a footnote, there appears a suggestion that the "result might have been different had Petitioner argued...the so called "cat out of the bag theory".

The entire argument to support the claim in Point II is gratuitious and begs the issue. The Petitioner does not object to the introduction of the second in-custody statement (tape recorded) since it was preceeded by Miranda warnings and in any event did not harm him. His objection is to the introduction of the first custodial statement which was not prefaced by Miranda warnings. This statement materially differed from the second statement tc the detrament of the Petitioner.

It should not be necessary, however, to answer the allegations made by Respondent in Point II. They amounted to harmless error arguments improperly made under the claim of an Article III, Section 2 objection. Respondent does not say that the opinion below was advisory or such an opinion is requested from this Court. Nowhere can be found an assertion that the issue at hand is hypothetical and was dealt with as such by the New Jersey Courts, or that the Petitioner lacks standing. There is in fact no explanation in Point II of why there is a lack of a justiciable case before this Court within the constraints of Article III, Section 2 of the Constitution.

Respectfully submitted.



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AUGUST 6, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 9, 1979 and (2) granting the petition. As grounds for this motion, petitioner states that the following substantial reasons to grant the petition were not previously presented to the Court:

1. THE NEED FOR MIRANDA WARNINGS IS DETERMINED BY THE NATURE OF THE INTERROGATION, NOT BY THE NATURE OF THE OFFENSE.

The petitioner was questioned while in the custody of the police. He had struck two pedestrians with his automobile, one of whom died later that night. The statement introduced on the State's case was not the product of a routine, on-the-street investigation of a traffic offense but rather the product of an interrogation that took place at police headquarters.

Miranda v. Arizona, 384 U.S. 436 (1964) does not prohibit the introduction of responses to on the scene inquiries by the police because "In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." Id., p. 477-478. In Clay v. Riddle, 541 F. 2d 456 (4th Cir. 1976) the majority held Miranda inapplicable to a statement which arose, after questioning by a police officer "in the environs of the unlawful highway operation of an automobile..." Dissenting Judge Butzner argued

that the interrogation was conducted after the defendant had been "taken into custody for interrogation about the traffic offense" (at 459). He went on to state the view that "the need for giving Miranda warnings should be determined by the nature of the interrogation, not the nature of the offense" and rejected the nonapplication of Miranda because of the triviality of the offense.

The petition for certiorari before the Court contained the suggestion that Miranda should apply to any offense committed where there was a potentiality of incarceration. (See reason II for granting the writ) The petitioner now requests that the Court consider the grounds contained in Judge Butzner's dissent in Clay v. Riddle, supra at 460, and the cases supporting his position cited therein, for granting the petition.

2. THE POLICE OFFICER HAD PROBABLE CAUSE TO ARREST PETITIONER FOR CRIMINAL ASSAULT AND SHOULD HAVE GIVEN MIRANDA WARNINGS PRIOR TO ANY QUESTIONING AT POLICE HEADQUARTERS.

The trial testimony of the arresting police

officer indicated that he had probable cause to arrest the petitioner for an indictable criminal offense rather than the motor vehicle violation for which he was ostensibly arrested and questioned at police headquarters. He testified that he arrived at the scene and observed two people lying in the road; that one individual (who shortly thereafter died) had sustained severe bodily injuries (the officer described his breathing as very heavy and had observed him bleeding from the mouth and ears and it appeared to him that both legs were broken); that the petitioner had admitted to striking both persons in response to the officer's on the scene questioning; that the officer smelled alcohol on the petitioner's breath and observed him swaying.

In State v. Schutte, 87 N.J.L. 15, 93 A. 112 (1915) affmd 88 N.J.L. 396, 96 A. 659 (1916), the court held that the malice and intention required for a criminal assault can be implied from driving an automobile at an excessive speed since it is a willful act likely to inflict injury. It is submitted that a criminal assault can be implied from driving an automobile under the influence of alcohol as well as from driving it at an excessive speed as in Schutte. Based on the totality of circumstances, there was probable cause to arrest the petitioner for an atrocious assault and battery in violation of N.J.S.A. 2A: 90-1.

The crime of atrocious assault and battery concerns itself with both the kind and severety injuries inflicted and the nature of the attack. Where a maiming or wounding is done by an assault and battery which is savagely brutal or inhumanly cruel or violent it amounts to an "atrocious assault and battery" within the intent of the statute. State v. Capawanna, 118 N.J.L. 429, 193 A. 902 (1937), affmd 119 N.J.L. 337, 196 A. 679. Given the nature of the officer's observations at the scene, it is unreasonable to believe that he was merely questioning the petitioner back at headquarters about a "petty offense" as the court in State v. Macuk, 57 N.J.1, 268 A. 2d 1 (1970) at 9 labeled motor ve-

hicle violations.*

The factual situation encountered by the arresting officers in Macuk, was much different than that encountered by the officer in the case at bar. In Macuk the police were indeed confronted with a "petty offense" situation:

> "Two policemen were separately dispatched to the scene. No sign of an accident was found, but an unoccupied car was observed at an angle off the road partly in a ditch the doors were locked. Officer Gross, the first to arrive, noticed a man who proved to be the defendant sitting on the porch of a nearby house. In response to the officer's question he admitted he had been driving the car and identified himself... He admitted he had been drinking. (57 N.J. at 5)

The serious nature of the offense and thus the necessity for constitutional safeguards did not escape recognition by another police officer who took a tape recorded statement from the petitioner at headquarters that night. Prior to this second round of questioning, the other officer gave the petitioner Miranda warnings prior to the police receiving

* Macuk is the New Jersey Supreme Court decision relied upon by the New Jersey Superior Court, Appellate Division in State v. Lewin, 163 N.J. Super 441, 395 A. 2d 212 to which the petition for certiorari is directed.

notice of the victim's death.**

It is submitted that the fact that the victim had not yet expired when the officer elicited the responses the petitioner seeks to suppress is of no consequence. To give recognition to the fiction that the questioning by the officer at police headquarters was undertaken to gather information soley for a traffic violation prosecution would be to ignore the evidence gathered by the officer at the scene. To hide behind semantics and postulate that there could have been no criminal assault in this case because what had occurred was a traffic violation or an "accident" up until the time of the death would belie the definition of the latter term. Accident is a defense to the charge of criminal assault because it negates the intent. It is not a defense, however, when an unforseen event, misfortune, act or ommission is the result of negligence. Only when a person commits an act or makes an ommission through misfortune or by accident under circumstances that show no evil design,

** The introduction of this tape recorded second statement is not objected to by petitioner. (See petitioner's Reply Memorandum, page 3)

intention or culpable negligence, he does not thereby commit a crime. State v. Edwards, 28 N.J. 292 (1958); State v. Currie, 41 N.J. 531 (1964). (emphasis added)

In sum, there was ample evidence of a criminal assault available to the officer for the arrest of the defendant. Due to the serious nature of the offense, Miranda warnings should have been given by that officer before any questioning at police headquarters proceeded. Since the defendant was not properly advised of his rights, the trial court erred in permitting the defendant's in-custody statements to go before the jury.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certeriori, petitioner prays that this court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

THOMAS EDWARD PLANT
COUNSEL FOR PETITIONER

October 29, 1979

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

THOMAS EDWARD PLANT
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